

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

1. STATE OF OKLAHOMA, ex rel.)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT J.D. STRONG in his)
capacity as the TRUSTEE FOR)
NATURAL RESOURCES FOR THE)
STATE OF OKLAHOMA,)

Plaintiff,)

v.)

Case No. 4:05-cv-00329-GKF-PJC

1. TYSON FOODS, INC.,)
2. TYSON POULTRY, INC.,)
3. TYSON CHICKEN, INC.,)
4. COBB-VANTRESS, INC.,)
5. CAL-MAINE FOODS, INC.,)
6. CARGILL, INC.,)
7. CARGILL TURKEY)
PRODUCTION, LLC,)
8. GEORGE'S, INC.,)
9. GEORGE'S FARMS, INC.,)
10. PETERSON FARMS, INC., and)
11. SIMMONS FOODS, INC.,)

Defendants.)

PRETRIAL ORDER

Following the Pretrial Conference held before the Court, IT IS ORDERED:

The following statements of facts or legal issues (including mixed questions of law and fact) as stated by each of the respective parties are not necessarily agreed to be proper facts or legal issues by any other party unless expressly incorporated by reference.

I. Parties' statement of the case

This is an environmental case brought by the State of Oklahoma ("State") a sovereign state of the United States. The case is brought against the following Defendants: Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., George's Farms, Inc., Peterson Farms, Inc. and Simmons Foods, Inc.

The Illinois River Watershed which is the focus of this matter is located roughly half in Oklahoma and half in Arkansas. Within the Illinois River Watershed are the Illinois River, the Baron (a/k/a Barren) Fork Creek, Caney Creek, Flint Creek, Tenkiller Ferry Lake, and other waters within the Oklahoma portion of the Illinois River Watershed.

The State alleges as more particularly set forth herein that Defendants have directly or indirectly polluted the waters of the Illinois River Watershed within Oklahoma with phosphorus in the form of phosphorous compounds and bacteria from the waste generated from the raising of Defendants' poultry that is applied to lands in the Illinois River Watershed. As currently postured, the State is, pursuant to federal and state law, seeking injunctive / equitable relief to remedy injuries allegedly caused by this pollution, as well as civil penalties, fees, costs and expenses.

Defendants as more particularly set forth herein deny the State's allegations on both legal and factual grounds, asserting that neither Defendants nor their contract growers have caused the harm alleged by the State. Defendants also allege certain affirmative defenses, including but not limited to the fact that the land application of poultry litter is regulated on a site-specific basis by Oklahoma and Arkansas, and that the State has consented to Defendants' conduct. Defendants also contend that they simply have not violated any of the state or federal statutes asserted against them.

For the convenience of the Court and given the Court's familiarity with this matter, the parties have limited this statement of the case.

A. State's Extant Causes of Action and Remedies

The extant causes of action and remedies sought thereunder are as follows:

1. RCRA;
2. state law public nuisance and state law nuisance *per se*;
3. federal common law nuisance;
4. trespass; and
5. violations of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1.

Under its RCRA claim, the State seeks injunctive / equitable relief, *see* 42 U.S.C. § 6972(a), and all costs of litigation (including reasonable attorneys and expert witness fees).

Under its state law nuisance claim, the State seeks injunctive / equitable relief, including but not limited to abatement, remediation, and costs associated with quantifying the amount of remediation.

Under its state law nuisance *per se* claim, the State seeks injunctive / equitable relief, including but not limited to abatement, remediation, and costs associated with quantifying the amount of remediation.

Under its federal common law nuisance claim, the State seeks injunctive relief / equitable, including but not limited to abatement, remediation, and costs associated with quantifying the amount of remediation.

Under its trespass claim, the State seeks injunctive / equitable relief, including but not limited to abatement, remediation, and costs associated with quantifying the amount of remediation.

Under its claim for violations of 27A Okla. Stat. § 2-6-105, the State seeks injunctive relief and civil penalties, as well as attorneys fees and costs associated with its recovery of civil penalties.

Under its claim for violations of 2 Okla. Stat. § 2-18.1, the State seeks injunctive relief.

B. Defendants' Affirmative Defenses

The extant affirmative defenses asserted by one or more of the Defendants are:

1. The State's claims are barred by the doctrines of license and consent.
2. The State's claims are barred by the doctrines of unclean hands and in *peri delicto*.
3. The State lacks standing to assert the remaining claims against some of the Defendants.
4. The State has failed to join parties who are indispensable to litigation of some of the relief the State seeks.
5. The State's claims are barred in whole or in part by the doctrines of exclusive jurisdiction and primary jurisdiction.
6. The States' claims are barred to the extent they rely on the retroactive application of statutes, rules, regulations or common-law standards of conduct,
7. The State's effort to impose Oklahoma statutes and common law upon practices occurring outside the borders of Oklahoma violates the due process clause under the Fourteenth Amendment to the United States Constitution the Dormant Commerce Clause, Article I, Section 8 of the United States Constitution, and the federalism and comity principles inherent in the United States Constitution.
8. Some or all of the State's claims are not amenable to judicial resolution because they present nonjusticiable political questions.

9. The State's claims are barred in whole or in part because the statutory or regulatory provisions upon which they are based are unconstitutionally void for vagueness or otherwise violate due process and the rule of lenity.
10. The State's state law claims are preempted in whole or in part by the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et al. (a.k.a, Clean Water Act), and the Arkansas River Basin Compact, Okla. Stat. title 82.
11. Some or all of the State's claims for equitable relief are barred.
12. The State seeks attorneys' fees and costs that are not recoverable as a matter of law and fact.
13. To the extent that any growers are found to be agents or employees of any Defendant, some or all of the acts of which the State complains were and are outside the scope of any such agency and employment, and the Defendant therefore is not liable.
14. Defendants acted in compliance with all applicable laws, regulations, permits, and industry standards at all applicable times.
15. The conduct and conditions alleged by the State do not constitute a recurring or permanent nuisance.
16. Some or all of the State's claims are barred by the State's assumption of the risk.

II. Federal jurisdiction is invoked on the following grounds:

The State asserts claims under the Resource Conservation and Recovery Act ("RCRA") and the federal common law of nuisance. As such, this Court has jurisdiction over the subject matter of this lawsuit pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 6972(a). This Court has supplemental jurisdiction over the remaining state law claims being asserted pursuant to 28 U.S.C. § 1367.

III. The following material facts are admitted and require no proof:

1. The Illinois River Watershed straddles the Oklahoma-Arkansas border, with portions of the Watershed in Oklahoma located in Delaware, Cherokee, Adair and Sequoyah counties, and portions of the Watershed in Arkansas located in Benton, Washington and Crawford counties.
2. Venue is proper in this District.
3. Included within the Illinois River Watershed are the Illinois River, the Baron (a/k/a Barren) Fork River, Caney Creek, Flint Creek, Tenkiller Ferry Lake, and other waters flowing in definite streams. Portions of the Illinois River, portions of the Baron (a/k/a Barren) Fork River, Caney Creek, Flint Creek, Tenkiller Ferry Lake and other waters flowing in definite

streams lie within the Oklahoma portion of the Illinois River Watershed. The Illinois River flows from Arkansas into Oklahoma. The Illinois River flows into Tenkiller Ferry Lake.

4. The Illinois River Watershed has been designated a "nutrient limited watershed" by the Oklahoma Water Resources Board, and a "nutrient surplus area[]" for phosphorus and nitrogen" by the Arkansas Legislature.

5. The Court has personal jurisdiction over each Defendant.

IV. The reservations to the facts recited in Paragraph III are as follows:

None.

V. The following, though not admitted, are not to be contested at the trial by evidence to the contrary:

None.

VI. The case management conference limitations are:

At the pretrial conference, the parties request that the Court impose the following requirements for the conduct of trial. These requirements will minimize the disruption and burden on the parties and the Court:

1. Each party must notify the other parties seventy-two (72) hours in advance of the identity of any witness whom that party will call to testify. At that time the party calling the witness will provide copies of any exhibits (including demonstratives) that the party may use with that witness. Exhibits and documents that will be used in cross examination will be provided to the opposing parties at the time of their use and are otherwise exempt from this exchange requirement and need not be disclosed in advance of their use other than the general obligation to identify all items that will be offered into evidence as required by the Federal Rules of Civil Procedure.

2. Any party calling a witness by use of prior deposition testimony must notify the other parties seventy-two (72) hours in advance of the specific lines of deposition testimony that the party intends to present in evidence. This does not include use of a deposition during cross-examination.

3. The State asserts that an exemption from the requirements set forth herein should be allowed to prevent manifest injustice.

VII. The following issues of law, and no others, remain to be litigated upon the trial:

A. The State's issues of law (including mixed questions of law and fact)

Issues of Law (Including Mixed Issues of Law and Fact) Generally
Applicable to One or More of the State's Claims

1. Whether each Defendant knew or had reason to know that the poultry feeding operations work it had employed its contract growers to do was likely to involve a trespass upon the waters running in definite streams in Oklahoma or the creation of a public nuisance in Oklahoma such that that Defendant is legally responsible for any nuisance or trespass caused, directly or indirectly, by its contract growers.

2. Whether the relationship between each Defendant and its contract growers is one of employer-employee and / or principal-agent such that, as a matter of law, the acts of the contract growers constitute the acts of such Defendant.

3. Whether each Defendant, directly or vicariously, has contributed and continues to contribute to phosphorus or bacteria loading in the Illinois River Watershed and whether phosphorus or bacteria in the Illinois River Watershed results in the injury or threatened injury to the waters (and biota therein) in the Oklahoma portion of the Illinois River Watershed, thereby making each such Defendant's actions a cause of the injury or threatened injury.

4. Whether the injury to the waters (and biota therein) of the Oklahoma portion of the Illinois River Watershed is indivisible, thereby eliminating any need for the State to prove the portion or quantity of injury caused by each particular Defendant.

5. Whether each Defendant's relevant nuisance-causing or trespass-causing conduct was done with knowledge that injury was and is resulting or was and is substantially certain to result from its conduct, thereby making each such Defendant jointly and severally liable for such injury.

6. Whether the acts, conduct and omissions of Benton County Foods, L.L.C. in connection with its poultry feeding operations in the Illinois River Watershed are legally those of Cal-Maine Foods, Inc.

7. Whether, as to each of the State's claims, Defendants have any defense(s) and / or affirmative defense(s) that are valid as a matter of law and / or fact, and if so, the impact of such defense and / or affirmative defense on such claim.

8. Whether the Oklahoma Registered Poultry Feeding Operations Act or any requirement or provision therein acts as an affirmative defense to each Defendant's liability for pollution or threatened pollution from poultry waste generated by its birds.

9. Whether each Defendant has proven that poultry waste has been managed and applied in a manner consistent with an animal waste management plan and the Oklahoma Registered Poultry Feeding Operations Act.

10. Whether Arkansas law or regulation of poultry waste can authorize violations of federal or Oklahoma law.

11. Whether an animal waste management plan is a permit or authorization to land apply poultry waste.

12. Whether the State permits or authorizes land application of poultry waste.

13. Whether an animal waste management plan permits or authorizes any particular instance of land application of poultry waste in the Illinois River Watershed.

14. Whether poultry waste must be managed and applied in accordance with all provisions of the Oklahoma Registered Poultry Feeding Operations Act, as well as and including all provisions of state and federal law.

15. Whether Arkansas regulation of poultry waste can authorize violations of Oklahoma or federal law.

16. Whether Arkansas regulation of poultry waste can authorize conduct creating or threatening to create pollution, contamination or endangerments to human health or the environment in Oklahoma.

17. Whether the State has brought this action on its own behalf and as *parens patriae* on behalf of the citizens of Oklahoma.

18. Whether approximately 70 miles of the Illinois River, approximately 35 miles of Baron Fork Creek and approximately 12 miles of Flint Creek have been designated since 1970 by the Oklahoma Legislature as Scenic River Areas.

19. Whether the designation as "Scenic River Areas" reflects a recognition by the Oklahoma Legislature that these rivers and streams "possess such unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the state that it is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma."

20. Whether the State has designated the Illinois River, Flint Creek and Baron Fork Creek, as well as many of their tributaries as "Outstanding Resource Waters" because of their exceptional recreational and ecological significance and these waters are, accordingly, given the highest level of protection from pollution under the law.

21. Whether any degradation of water quality in outstanding resource waters and scenic rivers, including waters located within the watersheds of scenic rivers, is expressly prohibited by Oklahoma law.

22. Whether the State has designated Lake Tenkiller as a "High Quality Water" in which the historically high water quality must be maintained and protected.

23. Whether pollution of the Illinois River Watershed by phosphorus and bacteria has caused waters located within the watershed to be in violation of anti-degradation standards and narrative and numeric water quality criteria set forth in the law to protect and maintain beneficial uses of the water.

24. Whether each Defendant, individually and / or by and through its duly authorized agents, servants, employees and / or contractors, is operating and / or has operated poultry feeding operations in the Illinois River Watershed.

25. Whether each Defendant's poultry feeding operations in the Illinois River Watershed are integrated.

26. Whether Defendants control all aspects of the poultry feeding operations in the Illinois River Watershed and are, thus, directly and vicariously liable for the poultry waste disposal activities and resulting pollution of the waters in the Illinois River Watershed.

27. Whether the acts, conduct and omissions of George's Farms, Inc. (a wholly owned subsidiary of George's, Inc.) in connection with its poultry feeding operations in the Illinois River Watershed are legally those of George's, Inc.

28. Whether the acts, conduct and omissions of Evans & Evans (a wholly owned subsidiary of Peterson Farms, Inc.) in connection with its poultry feeding operations in the Illinois River Watershed are legally those of Peterson Farms, Inc.

29. Whether the acts, conduct and omissions of Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. (each wholly owned subsidiaries of Tyson Foods, Inc.) in connection with each's poultry feeding operations in the Illinois River Watershed are legally those of Tyson Foods, Inc.

30. Whether the nutrients and other components in poultry waste originate in the IRW and thus are "returned" to the soil of the IRW when they are land applied in the IRW.

31. Whether poultry waste is fertilizer or a soil amendment.

32. Whether the land application of poultry waste under each Defendant's waste disposal practices predate use of water of the Oklahoma portion of the IRW for recreation and drinking water supply and other beneficial uses.

33. Whether the land application of poultry waste under each Defendant's waste disposal practices constitutes good agricultural practices.

34. Whether each Defendant's waste disposal practices is having or has had a substantial adverse effect on the public health and safety.

35. Whether the Oklahoma Registered Poultry Feeding Operations Act provides Defendants with any defense with respect to conduct before its effective date?

36. Whether the Arkansas statutes (1) Ark. Code Ann. §§ 15-20-901 et seq., "Arkansas Poultry Feeding Operations Registration Act," (2) Ark. Code Ann. §§ 15-20-1001 et seq., "Arkansas Soil Nutrient Management Planner and Applicator Certification Act.," and (3) Ark. Code Ann. §§ 15-20-1101 et seq., "Arkansas Soil Nutrient Application and Poultry Litter Utilization Act." and regulations thereunder have any applicability to this case?

37. Whether the Arkansas statutes (1) Ark. Code Ann. §§ 15-20-901 et seq., "Arkansas Poultry Feeding Operations Registration Act," (2) Ark. Code Ann. §§ 15-20-1001 et seq., "Arkansas Soil Nutrient Management Planner and Applicator Certification Act.," and (3) Ark. Code Ann. §§ 15-20-1101 et seq., "Arkansas Soil Nutrient Application and Poultry Litter Utilization Act." and regulations thereunder provides Defendants with any defense with respect to conduct prior to their effective date?

38. Whether each Defendant owns the poultry waste created by its birds?

39. Whether each Defendant's conduct, directly or vicariously, is authorized expressly or otherwise by statute?

40. Whether Defendants have waived any objection to the absence of the Cherokee Nation for the purposes of the requested injunctive relief.

41. Whether Defendants' conduct, directly or vicariously, contributes to exceedences of Oklahoma water quality standards in the Oklahoma portion of the IRW?

RCRA

42. Whether each Defendant is a "person" under RCRA.

43. Whether poultry waste generated by each Defendant's birds that is land-applied in the Illinois River Watershed constitutes a "solid waste" under RCRA.

44. Whether poultry waste generated by each Defendant's birds that is not reused or recycled in a continuous process for the purpose of its poultry feeding operations in the Illinois River Watershed constitutes a "solid waste" under RCRA.

45. Whether land-applied poultry waste generated by each Defendant's birds which has been applied above the phosphorus agronomic critical level in the Illinois River Watershed constitutes a discarded material resulting from agricultural operations so as to bring such poultry waste within the definition of "solid waste" under RCRA.

46. Whether land-applied poultry waste generated by each Defendant's birds which runs off or leaches into the waters the Illinois River Watershed constitutes a discarded

material resulting from agricultural operations so as to bring such poultry waste within the definition of "solid waste" under RCRA.

47. Whether each Defendant, within the meaning of RCRA, "has contributed or is contributing to" the past or present handling, storage, treatment, transportation, or disposal of such solid waste in the Illinois River Watershed.

48. Whether the past or present handling, storage, treatment, transportation, or disposal of such solid waste by each contributing Defendant "may present an imminent and substantial endangerment to health" in the Illinois River Watershed.

49. Whether the past or present handling, storage, treatment, transportation, or disposal of such solid waste by each contributing Defendant "may present an imminent and substantial endangerment to . . . the environment" in the Illinois River Watershed.

50. Whether the State is entitled to injunctive / equitable relief against each Defendant found to have contributed or be contributing to the past or present handling, storage, treatment, transportation, or disposal of such solid waste which may be presenting an imminent and substantial endangerment to health.

51. Whether the State is entitled to injunctive / equitable relief against each Defendant found to have contributed or be contributing to the past or present handling, storage, treatment, transportation, or disposal of such solid waste which may be presenting an imminent and substantial endangerment to the environment.

52. If the State is entitled to injunctive / equitable relief against any Defendant under RCRA, what injunctive / equitable measures against Defendants are necessary to prevent and remediate the endangerment to human health, as well as to assess and monitor remedial alternatives.

53. If the State is entitled to injunctive / equitable relief against any Defendant under RCRA, what injunctive / equitable measures against Defendants are necessary to prevent and remediate the endangerment to the environment, as well as to assess and monitor remedial alternatives.

54. Whether the State is entitled to recover from each Defendant, jointly and severally or otherwise, the costs of litigation (including reasonable attorney and expert witness fees) incurred in connection with its RCRA claim, and if so, in what amounts.

State Law Nuisance and State Law Nuisance Per Se

55. Whether each Defendant's conduct in Oklahoma, directly or by vicarious liability, is causing, has caused or has a reasonable probability of causing an unreasonable interference with or impairment of the State's and the public's beneficial use and enjoyment of the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed so as to constitute an intentional public nuisance under Oklahoma state law.

56. Whether each Defendant's conduct in Oklahoma, directly or by vicarious liability, is causing, has caused or has a reasonable probability of causing an unreasonable and substantial danger to the public's health and safety in the waters located in the Oklahoma portion of the Illinois River Watershed so as to constitute an intentional public nuisance under Oklahoma state law.

57. Whether each Defendant's conduct in Oklahoma, directly or by vicarious liability, is polluting or has polluted the waters located in the Oklahoma portion of the Illinois River Watershed so as to constitute a public nuisance *per se*, pursuant to 27A Okla. Stat. § 2-6-105.

58. Whether each Defendant's conduct in Oklahoma, directly or by vicarious liability, is polluting or has polluted the waters located in the Oklahoma portion of the Illinois River Watershed so as to constitute a public nuisance *per se*, pursuant to 2 Okla. Stat. § 2-18.1.

59. If a nuisance under Oklahoma state law or nuisance *per se* exists that is threatening injury or causing injury to the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed, whether the State is entitled to injunctive / equitable relief against each Defendant found to be a cause of the threatened injury or injury.

60. If the State is entitled to injunctive / equitable relief against any Defendant under its Oklahoma state law nuisance or nuisance *per se* claims, what injunctive / equitable measures against each Defendant are necessary to prevent and remediate such threatened injury or injury to human health or the environment, as well as to assess and monitor remedial alternatives.

61. Whether the State has incurred in the past costs and expenses as a result of a nuisance under Oklahoma state law or nuisance *per se* for which the State is entitled to receive reimbursement from each Defendant, jointly and severally or otherwise, as well as whether the State is entitled to declaratory relief for future costs and expenses incurred while injunctive / equitable relief is carried out from each Defendant, jointly and severally or otherwise.

62. In the event that the Court does not apply federal common law nuisance to conduct in Arkansas, whether each Defendant's conduct in Arkansas, directly or by vicarious liability, is causing or has caused an unreasonable interference with or impairment of the State's and the public's beneficial use and enjoyment of the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed or a significant threat of an unreasonable invasion of and impairment of the State's and the public's beneficial use and enjoyment of the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed so as to constitute an intentional public nuisance under Arkansas state law.

63. In the event that the Court does not apply federal common law nuisance to conduct in Arkansas, whether each Defendant's conduct in Arkansas, directly or by vicarious liability, is causing or has caused an unreasonable and substantial danger to the public's health and safety in the waters located in the Oklahoma portion of the Illinois River Watershed or a significant threat of an unreasonable and substantial danger to the public's health and safety in

the waters located in the Oklahoma portion of the Illinois River Watershed so as to constitute an intentional public nuisance under Arkansas state law.

64. In the event that the Court does not apply federal common law nuisance to conduct in Arkansas, if a nuisance under Arkansas state law exists that is threatening injury or causing injury to the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed, whether the State is entitled to injunctive / equitable relief against each Defendant found to be a cause of the threatened injury or injury.

65. In the event that the Court does not apply federal common law nuisance to conduct in Arkansas, if the State is entitled to injunctive / equitable relief against any Defendant under its Arkansas state law nuisance claims, what injunctive / equitable measures against each Defendant are necessary to prevent and remediate such threatened injury or injury to human health or the environment, as well as to assess and monitor remedial alternatives.

66. In the event that the Court does not apply federal common law nuisance to conduct in Arkansas, whether the State has incurred in the past costs and expenses as a result of a nuisance under Arkansas state law for which the State is entitled to receive reimbursement from each Defendant, jointly and severally or otherwise, as well as whether the State is entitled to declaratory relief for future costs and expenses incurred while injunctive / equitable relief is carried out from each Defendant, jointly and severally or otherwise.

Federal Common Law Nuisance

67. Whether each Defendant's conduct in Arkansas, directly or by vicarious liability, is causing or has caused an unreasonable interference with or impairment of the State's and the public's beneficial use and enjoyment of the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed or a significant threat of an unreasonable invasion of and impairment of the State's and the public's beneficial use and enjoyment of the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed so as to constitute an intentional public nuisance.

68. Whether each Defendant's conduct in Arkansas, directly or by vicarious liability, is causing or has caused an unreasonable and substantial danger to the public's health and safety in the waters located in the Oklahoma portion of the Illinois River Watershed or a significant threat of an unreasonable and substantial danger to the public's health and safety in the waters located in the Oklahoma portion of the Illinois River Watershed so as to constitute an intentional public nuisance.

69. If a federal common law nuisance exists that is threatening injury or causing injury to the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed, whether the State is entitled to injunctive / equitable relief against each Defendant found to be a cause of the threatened injury or injury.

70. If the State is entitled to injunctive / equitable relief against any Defendant under its federal common law nuisance claims, what injunctive / equitable measures against each

Defendant are necessary to prevent and remediate such threatened injury or injury to human health or the environment, as well as to assess and monitor remedial alternatives.

71. Whether the State has incurred in the past costs and expenses as a result of a federal common law nuisance for which the State is entitled to receive reimbursement from each Defendant, jointly and severally or otherwise, as well as whether the State is entitled to declaratory relief for future costs and expenses incurred while injunctive / equitable relief is carried out from each Defendant, jointly and severally or otherwise.

Trespass

72. Whether each Defendant's conduct, directly or by vicarious liability, is causing or has caused phosphorus or bacteria to enter the waters of the Illinois River Watershed, and by reason thereof causing, without authority or consent, a physical invasion and interference of the State's possessory property interests in the waters running in definite streams located in the Oklahoma portion of the Illinois River Watershed so as to constitute an intentional trespass.

73. If a trespass exists that is causing injury to the waters running in definite streams located in the Oklahoma portion of the Illinois River Watershed, whether the State is entitled to injunctive / equitable relief against each Defendant found to be a cause of such injury.

74. If the State is entitled to injunctive / equitable relief against any Defendant under its trespass claim, what injunctive / equitable measures against each Defendant are necessary to prevent and remediate such injury to human health or the environment, as well as to assess and monitor remedial alternatives.

75. Whether the State has incurred in the past costs and expenses as a result of a trespass for which the State is entitled to receive reimbursement from each Defendant, jointly and severally or otherwise, as well as whether the State is entitled to declaratory relief for future costs and expenses incurred while injunctive / equitable relief is carried out from each Defendant, jointly and severally or otherwise.

Violations of 27A Okla. Stat. § 2-6-105

76. Whether each Defendant, by its conduct in Oklahoma, directly or by vicarious liability, is violating or has violated 27A Okla. Stat. § 2-6-105 by having placed or caused to be placed poultry waste in a location where it is likely to cause pollution of any waters located in the Oklahoma portion of the Illinois River Watershed.

77. As to each Defendant found to be in violation of 27A Okla. Stat. § 2-6-105 by having placed or caused to be placed poultry waste in a location where it is likely to cause pollution of any waters located in the Oklahoma portion of the Illinois River Watershed, whether the State is entitled to injunctive / equitable relief against each such Defendant.

78. If the State is entitled to injunctive / equitable relief against each Defendant for being in violation of 27A Okla. Stat. § 2-6-105 by having placed or caused to be

placed poultry waste in a location where it is likely to cause pollution of any waters located in the Oklahoma portion of the Illinois River Watershed, what injunctive / equitable measures are necessary against each Defendant to prevent and remediate such threatened pollution, as well as to assess and monitor remedial alternatives.

79. Whether each Defendant, by its conduct in Oklahoma, directly or by vicarious liability, is violating or has violated 27A Okla. Stat. § 2-6-105 by having caused pollution of any waters located in the Oklahoma portion of the Illinois River Watershed.

80. As to each Defendant found to be in violation of 27A Okla. Stat. § 2-6-105 by having caused pollution of any waters located in the Oklahoma portion of the Illinois River Watershed, whether the State is entitled to injunctive / equitable relief against each such Defendant.

81. If the State is entitled to injunctive / equitable relief against each Defendant for being in violation of 27A Okla. Stat. § 2-6-105 by having caused pollution of any waters located in the Oklahoma portion of the Illinois River Watershed, what injunctive / equitable measures against each Defendant are necessary to prevent and remediate such pollution, as well as to assess and monitor remedial alternatives.

82. As to each Defendant found to be in violation of 27A Okla. Stat. § 2-6-105 by having caused pollution of any waters located in the Oklahoma portion of the Illinois River Watershed or having placed or caused to be placed any poultry waste in a location where it is likely to cause pollution of any waters located in the Oklahoma portion of the Illinois River Watershed, whether such Defendant's conduct is such that the State is entitled to an assessment of civil penalties against such Defendant and, if so, in what amount.

83. As to each Defendant that is assessed civil penalties for having violated 27A Okla. Stat. § 2-6-105, what amounts of attorneys fees and costs shall each such Defendant be required to pay.

Violations of 2 Okla. Stat. § 2-18.1

84. Whether each Defendant is subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry.

85. Whether each Defendant, by its conduct in Oklahoma, directly or by vicarious liability, is violating or has violated 2 Okla. Stat. § 2-18.1 by having caused pollution of any waters located in the Oklahoma portion of the Illinois River Watershed.

86. As to each Defendant found to be in violation of 2 Okla. Stat. § 2-18.1 by having caused pollution of any waters located in the Oklahoma portion of the Illinois River Watershed, whether the State is entitled to injunctive / equitable relief.

87. If the State is entitled to injunctive / equitable relief against each Defendant for being in violation of 2 Okla. Stat. § 2-18.1 by causing pollution of any waters

located in the Oklahoma portion of the Illinois River Watershed, what injunctive / equitable measures against each Defendant are necessary to prevent and remediate such pollution, as well as to assess and monitor remedial alternatives.

The State reserves all issues of law and mixed issues of law and fact raised in its Second Amended Complaint that have been removed from the trial of this matter by virtue of one or more rulings by this Court (e.g., on motions to dismiss, on motions for summary judgment, on motions for judgment on the pleadings, on the Rule 19 motion, etc.) so as to ensure the preservation of such issues for purposes of appeal or any subsequent trial or retrial of claims (including claims for relief) raised in the Second Amended Complaint.

B. Defendants' issues of law (including mixed questions of law and fact)

Issues Generally Applicable to the State's Claims

1. Whether every application of poultry litter to land in the IRW must be performed by a registered poultry farmer ("Grower") or certified applicator consistent with a nutrient management plan ("NMP") and/or animal waste management plan ("AWMP")? *See* 2 O.S. §§ 10-9.7, 20-48; 2 O.S. § 10.9-16, *et seq.*; Ark. Code Ann. § 15-20-1108(b)(1); Ark. Code Ann. § 15-20-1001, *et seq.*; ANRC Reg. 2201.1, *et seq.*; ANRC Reg. 2101.1.

2. Whether these plans are written or approved by agent(s) for the States of Oklahoma and Arkansas?

3. Whether, before and during this litigation, agents on behalf of Oklahoma and Arkansas have continued to draft, approve and/or issue new plans for land application of poultry litter within the IRW?

4. Whether these state-approved poultry litter management plans are specifically tailored to each field, take into consideration the unique characteristics of that property, and dictate the method, location and amount of poultry litter that may be applied? *See* 2 O.S. §§ 10-9.7, 20-48; 2 O.S. § 10.9-16, *et seq.*; Ark. Code Ann. § 15-20-1108(b)(1); Ark. Code Ann. § 15-20-1001, *et seq.*; ANRC Reg. 2201.1, *et seq.*; ANRC Reg. 2101.1.

5. Whether these state-approved poultry litter management plans are designed to avoid the runoff of pollution to the waters of the State?

6. Whether Oklahoma and Arkansas law requires the persons who write and approve these poultry litter management plans to design a plan that will avoid the runoff of pollution to the waters of the State?

7. Whether Defendants and/or the Contract Growers who raise poultry for Defendants reasonably believe that these state-approved poultry litter management plans avoid the runoff of pollution to the waters of the State if the plans' terms are followed?

8. Whether Defendants and/or the Contract Growers who raise poultry for Defendants reasonably believe that applying poultry litter in conformity with state-approved

poultry litter management plans and their accompanying regulations is sufficient to comply with state and federal law?

9. Whether the State can prove that any particular application of poultry litter at a particular site on a particular date violated the applicable Oklahoma or Arkansas poultry-litter management regulations, including the specific instructions provided by those States under these state-approved plans that resulted in the run off of significant pollutants to the waters of the State of Oklahoma, or caused a violation of Oklahoma water quality standards?

- a. Whether the State can prove that any particular application of poultry litter *by a Defendant* violated the state-approved plan for that field?
- b. Whether the State can prove that any particular application of poultry litter *by a Contract Grower* violated the state-approved plan for that field?
- c. Whether the State can prove that any particular application of poultry litter *by third parties not under contract with a Defendant* violated the state-approved plan for that field?
- d. Whether a Defendant can be held legally responsible for an application of poultry litter by a Contract Grower?
- e. In light of the fact that the State's complaint does not allege that Defendants are legally responsible for an application of poultry litter by a third party not under contract with a Defendant, whether such a theory can be claimed at trial (and whether it has merit)?

10. Whether the State of Oklahoma can obtain equitable or injunctive relief against conduct that Oklahoma has authorized and continues to authorize?

11. Whether the State of Oklahoma can invoke this Court's extraordinary equitable powers to mandate changes in the terms of NMPs and AWMPs when Oklahoma wrote those plans and has the power to change them itself without any court involvement?

12. Whether Growers own the poultry litter created on Growers' farms?

13. Whether the State can prove that each Defendant was the cause of phosphorus or bacteria pollution in the waters of the State when there are thousands of sources of phosphorus and bacteria in the IRW and the State did no fate-and-transport study to link phosphorus or bacteria to any specific land application by any particular Defendant or Grower?

- a. Whether the State can prove that each Defendant's conduct was both the cause-in-fact and proximate cause of an alleged injury to the waters of the State?

14. Whether the State's evidence of causation and injury in this case is based on the aggregate alleged activities and impact of all Defendants (or poultry litter generally), as opposed to evidence that any particular Defendant caused any of the injuries alleged?

- a. Whether the State has traced alleged “contamination” or “pollution” of Lake Tenkiller, the Illinois River or its tributaries to a specific Defendant, to one or more specific fields where litter was used as a fertilizer, or to poultry farmers operating under contract with a specific Defendant?

15. Whether the State can prove the ownership, exclusive possession, or other legal interests necessary to establish the elements of its claims in the absence of the Cherokee Nation?

16. Whether the State has contributed to the very “contamination” or “pollution” of the waters of the State alleged in this case?

- a. Is the State responsible for the release of phosphorus and bacteria into the waters of the State?

17. Whether the injuries the State claims to fish, benthic organisms, and other environmental harms have in fact occurred in the IRW?

18. If environmental harms have occurred in the IRW, whether the State can prove that poultry litter land-applied by Defendants or Growers who contract with Defendants was the cause?

19. Whether there is an appropriate and legally enforceable standard for cyanobacteria in the IRW?

20. Whether any cyanobacteria in the IRW are similar in quantity and nature to background levels?

21. Whether standards for drinking water treatment byproducts have been violated in the IRW and, if so, what was the cause?

22. Whether the Clean Water Act preempts or displaces some or all of the State’s claims?

23. Whether the Dormant Commerce Clause preempts or displaces some or all of the State’s claims?

24. Whether the Arkansas River Basin Compact preempts or displaces some or all of the State’s claims?

25. Whether some or all of the State’s claims present nonjusticiable political questions?

26. The issues of law set forth in Section VII (A) above.

27. Defendants reserve all issues of law and mixed issues of law and fact that have been removed from the trial of this matter by virtue of one or more rulings by this Court so

as to ensure the preservation of such issues for purposes of appeal or further proceedings in this case.

Count 3 (the Resource Conservation and Recovery Act, (“RCRA”))

28. Has each Defendant “contributed to” the “past or present handling, storage, treatment, transportation, or disposal of any solid waste” within the meaning of RCRA? 42 U.S.C. § 6972(a)(1)(B).

29. Whether any particular Grower has applied poultry litter in a manner that causes an imminent and substantial endangerment to human health and the environment and, if so, which Grower(s) and on which fields?

30. Whether the State, within the meaning of RCRA, “has contributed or is contributing to” the past or present handling, storage, treatment, transportation, or disposal of such solid waste in the IRW?

31. The Court ruled that poultry litter is not *always* a “discarded material” that constitutes “solid waste” within the meaning of RCRA. Accordingly, the Court and parties must address whether any *particular instance* where poultry litter was land-applied in the IRW resulted in the “discard” of “solid waste” on that field. The following questions of law (or mixed law and fact) are relevant to this issue:

- a. In determining whether poultry litter was “discarded” in any particular instance, is it relevant that:
 - i. poultry litter has monetary value in the IRW?
 - ii. poultry litter is bought, sold and traded in the IRW?
 - iii. poultry litter has long been used as a fertilizer and soil amendment?
- b. Is the intent of the person using the poultry litter relevant to whether a particular application of poultry litter is “discarded material”?

32. Whether fertilizer changes from a beneficial product to a “discarded” “solid waste” solely because one component of the fertilizer is applied in excess of the agronomic need for that component at the particular time and place of application. If so, the Court and parties must address:

- a. What is the standard for determining the point at which a particular application of fertilizer changes from a beneficial product to a “discarded” “solid waste”?
- b. Regardless whether there is a universal standard for drawing this line, when an agent of the State inspects the characteristics of a particular property and tells the owner that (s)he may use a certain amount of poultry

litter as fertilizer on that property, does that instruction establish the line between “beneficial use” of poultry litter and “discarded material” on that property at that time?

33. In the instances where poultry litter has been land-applied in the IRW, were those “agricultural wastes” which were “returned to the soil as fertilizers or soil conditioners”?

34. In the instances where poultry litter has been land-applied in the IRW, was the poultry litter being put to its intended use?

35. Are any of the fields in the IRW where poultry litter has been land-applied “open dumps” within the meaning of RCRA?

36. Do Defendants control Contract Growers’ use of the Contract Growers’ own poultry litter?

37. Can the State prove that the use of poultry litter as a fertilizer in the IRW presents “an imminent and substantial endangerment to health or the environment”?

38. Whether the State may obtain injunctive or other equitable relief against any Defendant under RCRA when the State itself determined the appropriate amount of poultry litter for use as a fertilizer on each particular field and communicated that standard through NMPs, AWMPs, and its adoption of the Natural Resources Conservation Service Code 590 for Oklahoma?

- a. When an agent of the State inspects the characteristics of a particular property and tells the owner that (s)he may use a certain amount of poultry litter as fertilizer on that property, does that instruction establish that such use will not create “an imminent and substantial endangerment to health or the environment”?

39. Whether the State established an “imminent and substantial endangerment” to the entire IRW, so as to justify an injunction addressing the whole million-acre watershed?

40. Whether any finding that poultry litter is “solid waste” under RCRA triggers the requirements of the solid waste management sections of RCRA and, if so, what requirements would apply and how they would affect any proposed remedy?

41. Whether the State have established that any Defendant has violated the hazardous waste subtitle of RCRA, 42 U.S.C. § 6921 et seq., and is therefore liable for civil penalties as alleged in paragraph 96 of the State’s Second Amended Complaint?

- a. Whether any party other than the federal government may ever recover civil penalties under RCRA?

42. If the State were to prevail in whole or in part on its RCRA claim, whether an award of fees or costs incurred in connection with its RCRA claim should be limited so as to preclude recovery on work that was rejected on a legal or factual basis?

Count 4 (Oklahoma Statutory Nuisance and Common Law of Nuisance Claims Based on Conduct Occurring Solely in Oklahoma)

Nuisance *Per se*

43. Is the land application of poultry litter as a fertilizer or soil amendment “a nuisance at all times and under any circumstances, regardless of location or surroundings”?

44. Is the land application of poultry litter in the IRW a statutorily authorized and regulated agricultural activity?

45. Is poultry litter a safe and effective fertilizer when used in compliance with Arkansas’ and Oklahoma’s regulations?

46. Can the State show that its poultry litter regulations (including the field-specific litter management plans) are *always* ineffective and thus result in significant pollution to the waters of the State or a violation of Oklahoma’s water quality standards every time poultry litter is used?

Public Nuisance (and Nuisance *Per se*)

47. Does the land application of poultry litter in the Oklahoma portion of the IRW (a) cause (b) an unreasonable interference; (c) with a right common to the general public; (d) by a Defendant with control over the instrumentality alleged to have created the nuisance at the time when the alleged nuisance-causing activity occurred?

- a. Can the State prove that the land application of poultry litter in the Oklahoma-portion of the IRW, and not some other source (including but not limited to the land application of poultry litter in the Arkansas portion of the IRW) was the cause of significant pollution to the waters of the State or a violation of Oklahoma’s water quality standards?
- b. Does each Defendant have control over poultry litter at the time the alleged injury-causing activity occurs (when the poultry litter is applied to specific fields in method(s), amount(s), location(s) and time(s) causing a nuisance)?
- c. Is poultry litter used in the Oklahoma portion of IRW land-applied by non-party farmers and ranchers who purchase the litter on the market and have no contractual relationship with Defendants? If so, can Defendants be held responsible for the actions of these non-parties (especially in light of the fact that the State did not plead such liability in its complaint)?

- d. Through the litter management plans, does the State of Oklahoma substantially control the decisions about how, where, when and how much poultry litter should be applied to specific fields?
- e. When an agent of the State inspects the characteristics of a particular property and instructs the owner that (s)he may use a certain amount of poultry litter as fertilizer on that property pursuant to the rates and instructions set forth in a state-approved litter management plan, does that instruction establish that any “interference” caused by such use is not “unreasonable”?
- f. When an agent of the State inspects the characteristics of a particular property and instructs the owner that (s)he may use a certain amount of poultry litter as fertilizer on that property pursuant to the rates and instructions set forth in a state-approved litter management plan, has the State consented to and/or authorized that use?

48. Is the land application of poultry litter in the Oklahoma-portion of the IRW pursuant to a state-approved litter management plan “done or maintained under the express authority of a statute”? 50 O.S. § 4 (2008).

49. Did each Defendant intend to invade another’s interest in the use or enjoyment of land or an interference with the public right?

- a. Did each Defendant act for the purpose of causing an invasion of another’s interest in the use or enjoyment of land or an interference with the public right?
- b. When an agent of the State inspects the characteristics of a particular property and instructs the owner that (s)he may use a certain amount of poultry litter as fertilizer on that property pursuant to the rates and instructions set forth in a state-approved litter management plan, can that owner or any Defendant with whom (s)he contracts know that a nuisance is resulting or is substantially certain to result?

50. Is significant pollution of the waters of the State or a violation of Oklahoma’s water quality standards a “necessary result” of raising poultry? Or is it possible to raise poultry without causing significant pollution of the waters of the State? Restatement (2d) of Torts § 427B.

51. Has the conduct of any Defendant or Grower annoyed, injured, or endangered a sufficient number of people at the same time to constitute a “public nuisance”?

52. What portion of the “interference” asserted by the State’s nuisance claims is attributable to the State’s own actions or acquiescence?

Count 5 (Federal Common Law of Nuisance)

53. Whether the action for nuisance is recognized under federal common law?
54. Whether the State's federal common law of nuisance claim is preempted under federal law?
55. Does the land application of poultry litter in the IRW (a) cause (b) an unreasonable interference; (c) with a right common to the general public; (d) by a Defendant with control over the instrumentality alleged to have created the nuisance at the time when the alleged nuisance-causing activity occurred?
- a. Can the State prove that the land application of poultry litter in the IRW, and not some other source, was the cause of significant pollution to the waters of the State or a violation of Oklahoma's water quality standards?
 - b. Does each Defendant have control over poultry litter at the time the alleged injury-causing activity occurs (when the poultry litter is applied to specific fields in method(s), amount(s), location(s) and time(s) causing a nuisance)?
 - c. Is poultry litter used in the IRW land-applied by non-party farmers and ranchers who purchase the litter on the market and have no contractual relationship with Defendants? If so, can Defendants be held responsible for the actions of these non-parties (especially in light of the fact that the State did not plead such liability in its complaint)?
 - d. Through the NMPs and AWMPs, does the State substantially control the decisions about how, where, when and how much poultry litter should be applied to specific fields?
 - e. When an agent of the State inspects the characteristics of a particular property and instructs the owner that (s)he may use a certain amount of poultry litter as fertilizer on that property pursuant to the rates and instructions set forth in a state-approved litter management plan, does that instruction establish that any "interference" caused by such use is not "unreasonable"?
 - f. When an agent of the State inspects the characteristics of a particular property and instructs the owner that (s)he may use a certain amount of poultry litter as fertilizer on that property pursuant to the rates and instructions set forth in a state-approved litter management plan, has the State consented to and/or authorized that use?
56. Is the land application of poultry litter pursuant to a state approved litter management plan "done or maintained under the express authority of a statute"? 50 O.S. § 4 (2008).

57. Did each Defendant intend to invade another's interest in the use or enjoyment of land or an interference with the public right?

- a. Did each Defendant act for the purpose of causing an invasion of another's interest in the use or enjoyment of land or an interference with the public right?
- b. When an agent of the State inspects the characteristics of a particular property and instructs the owner that (s)he may use a certain amount of poultry litter as fertilizer on that property pursuant to the rates and instructions set forth in a state-approved litter management plan, can that owner or any Defendant with whom (s)he contracts know that a nuisance is resulting or is substantially certain to result?

58. Is significant pollution of the waters of the State or a violation of Oklahoma's water quality standards a "necessary result" of raising poultry? Or is it possible to raise poultry without causing significant pollution of the waters of the State? Restatement (2d) of Torts § 427B.

59. Has the conduct of any Defendant or Grower annoyed, injured, or endangered a sufficient number of people at the same time to constitute a "public nuisance"?

60. What portion of the "interference" asserted by the State's nuisance claims is attributable to the State's own actions or acquiescence?

Count 6 (Oklahoma Common Law Trespass)

61. Whether the State can prove (i) a possessory property interest in the property in question; (ii) "actual and exclusive possession" of the property; and (iii) an invasion without legal authorization or the consent of the person lawfully entitled to possession?

62. The State has narrowed its trespass claim (and all of its claims) to the assertion that the State has a sovereign "possessory property interest in the water in that portion of the [IRW] located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." SAC ¶119; see Dkt. No. 1917 at 17-18.

- a. Whether the State has the required "possessory property interest" in the waters where the trespass is alleged to have occurred?
- b. Whether the Cherokee Nation has a claim to be the rightful owner and trustee of the waters in question?
- c. Whether the State maintains the requisite "actual and exclusive possession" of the public waters alleged to have been invaded?

63. Defendants contend that the State has admitted that “[w]ater running in a definite stream, formed by nature over or under the surface not used by riparian owners is *public water and* subject to appropriation *for the benefit and welfare of the people of the state.*” Dkt. No. 1917 at 18 (citing 60 O.S. § 60) (emphasis added, in part). Defendants contend that the State also disclaimed a trespass claim based purely on private interests; rather, it asserts a “public-interest action” based solely on the State’s sovereign interests in protecting “public water” in Oklahoma. Dkt. No. 1917 at 17-18. Accordingly, if Defendants’ contentions are correct, the Court and parties must address:

- a. As a matter of law, whether the tort of trespass protects such public interest claims, even where the State asserts a sovereign or *parens patriae* interest? *See, e.g., New Mexico*, 335 F. Supp. 2d at 1231-35, *aff’d* 467 F.3d at 1248 n.36; *Mathes v. Century Alumina Co.*, 2008 U.S. Dist. LEXIS 90087, *28, *35 (D.V.I. Oct. 31, 2008) (“Because guardianship of the public trust does not rise to the level of possession necessary to maintain an action in trespass, the trespass claim is dismissed.”).
- b. Whether the State maintains the requisite “actual and exclusive possession” of the public waters alleged to have been invaded, or whether the State’s rights in public waters are inherently non-exclusive?

64. Whether the State can prove “an actual physical invasion” of the waters of the State “without the permission of the person lawfully entitled to possession.”

65. Whether the State can prove that any phosphorus or bacteria found in the waters of the State came from poultry litter land applied by a Defendant or a Grower under contract with a Defendant in the Oklahoma portion of the IRW and not some other source?

66. Whether the State can prove that each Defendant intended to trespass on the waters of the State?

67. Whether the alleged trespass-causing activity is authorized by the State of Oklahoma?

68. Whether the alleged trespass-causing activity is consented to or done with the permission of the State of Oklahoma?

69. Whether the State can disaggregate appropriate from allegedly inappropriate litter applications, or prove that any particular litter application was made in violation of the states’ comprehensive litter laws and regulations?

70. When an agent of the State inspects the characteristics of a particular property and tells the owner that (s)he may use a certain amount of poultry litter as fertilizer on that property, is the owner entitled to the good faith trespasser defense as to any claim of trespass resulting from such use?

71. Whether Oklahoma can seek to enjoin as a trespass conduct that Oklahoma itself specifically authorized?

72. Whether farmers who apply poultry litter to a particular field are acting pursuant to “[a] duty or authority ... created by legislative enactment,” or with the consent of the State?

a. If so, whether the State may assert the tort of trespass?

Counts 7 (Oklahoma State Statutes for Conduct Occurring Solely in Oklahoma)

73. In light of the fact that Oklahoma law specifically authorizes the application of poultry litter on a field-by-field basis, may the State enjoin activity that is in compliance with these specific laws by reference to a more general anti-pollution statute?

74. If the State can enjoin the activity by reference to the general anti-pollution statutes in 27A Okla. Stat. § 2-6-105(A) and/or 2 Okla. Stat. § 2-18.1, are those statutes unconstitutionally void for vagueness?

75. Is each Defendant a “person” within the meaning of 27A O.S. § 2-6-105 and 2 O.S. § 2-18.1?

76. Is each Defendant subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry for the specific activity that the State alleges caused a violation of 2 O.S. § 2-18.1?

77. As a matter of law, may farmers and ranchers reasonably rely upon the belief that they are not (i) “caus[ing] pollution of any waters of the state,” 27A O.S. § 2-6-105(A); 2 O.S. § 2-18.1(A); or (ii) “place[ing] or cause[ing] to be placed any wastes in a location where they are likely to cause pollution,” 27A O.S. § 2-6-105(A), when they comply with the plans approved by the State of Oklahoma, which say exactly how much poultry litter is appropriate to put on each specific field, and when and how that litter may be applied?

78. Does Oklahoma law place the burden on the State and its authorized agents to draft AWMs and NMPs in a manner ensuring compliance with the general prohibitions of 27A O.S. § 2-6-105 and 2 O.S. § 2-18.1(A)?

79. Can the State prove that each Defendant (i) caused; (ii) pollution; of (iii) the waters of the State (iv) in sufficient quantities to meet the statutory threshold for “pollution” under 27A Okla. Stat. § 1-1-201(10)?

80. Can the State prove that each Defendant (i) placed or caused to be placed; (ii) wastes; (ii) in a location where they are likely to cause pollution of the waters of the State (iv) in sufficient quantities to meet the statutory threshold for “pollution” under 27A Okla. Stat. § 1-1-201(10)?

81. Do the statutory regulations and duties imposed under 27A O.S. § 2-6-105 and 2 O.S. § 2-18.1(A) apply to each Defendant?

82. Does the State have standing and authority to seek civil penalties or injunctive relief under the 27A O.S. § 2-6-105 without a finding by the Executive Director of ODEQ, as specified in subsection B of that statute?

83. Do the Oklahoma and Arkansas poultry litter laws impose on Defendants any financial or legal obligations with respect to the management or disposition of poultry litter that results from Growers' poultry raising operations?

84. The State did not plead in its complaint that Defendants are responsible under these statutes for violations alleged to have been caused by the application of poultry litter by non-party farmers and ranchers (who are not Growers) who obtain poultry litter on the open-market and have no relationship with Defendants. Accordingly, is any such claim waived? If not, can Defendants be held responsible for the actions of such non-parties?

85. Is the State required to prove a violation of the statutory provisions and administrative rules alleged in Count 7 through identification of the date, location, amount of poultry litter applied, responsible person(s), and injury resulting for each such application?

86. Whether the State can prove that any specific application of poultry litter within the statute of limitations period violated the statutory provisions and administrative rules alleged in Count 7 through identification of the date, location, amount of poultry litter applied, responsible person(s), and injury resulting for each such application?

Additional Remedy Issues

87. Does the State have standing to seek prospective injunctive relief against Defendants who do not presently contract with any Growers in the IRW and have no plans to do so?

88. Will the State suffer an irreparable injury in the absence of an injunction?

- a. Does the State's delay in seeking relief preclude any finding of irreparable injury?
- b. Does the State's existing ability to address any excess application of poultry litter preclude any finding of irreparable harm?

89. Can the Court order Defendants to "remediate" conditions or install protective measures on private property owned by persons who are not parties to this action?

90. Can the Court impose injunctive relief on the poultry Growers that contract with the Defendants but who are not parties to this action consistent with Rule 65 and considerations of due process?

91. Are the remedial actions that the State seeks to impose services that are ordinarily provided to the general public regardless of this lawsuit, and thus an inappropriate remedy under the Free Public Services Doctrine?

92. Does the threatened harm the State alleges outweigh the injury that the injunction sought would cause to Defendants and to Growers and other non-parties?

93. Whether the State's proposed injunctive remedy is broader than necessary to achieve its stated purpose?

- a. Are there less intrusive and less harmful alternatives to the State's proposed injunctive relief?
- b. Will the State's proposed injunction impose burdens on fields as to which the State has made no showing of runoff of poultry litter or even of the application of poultry litter?
- c. Will the proposed injunctive relief make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law?

94. Is the injunctive relief the State seeks in the public interest?

95. Would the cost of any retrospective injunctive relief exceed any diminution in value of the lands of the IRW resulting from any nuisance or trespass, and thus be unavailable under Oklahoma law?

96. Would any prospective injunctive relief sought by the State actually and effectively solve the problem that the state alleges?

- a. Given that the Defendants neither own nor apply the poultry litter at issue, would a prospective injunction addressed solely to the Defendants in this action be effective in preventing the land application of poultry litter by non-parties, including the Growers?
- b. Given all the other contributing sources, would a prospective injunction address to the land application of poultry litter significantly reduce the amount of phosphorus and bacteria in the waters of the State in the IRW?

97. Given the necessarily grower-by-grower, field-by-field nature of any justification through which the State might justify a prospective injunction, whether the complexity of any injunction and the ongoing burden of modifying and enforcing such a "regulatory" injunction prevent the Court as a practical matter from issuing any such injunction?

98. Whether the equitable remedies the State requests should be limited or denied based on the harm caused to Defendants or non parties?

99. Whether the equitable remedies the State requests would affect the rights or interests of the Cherokee Nation?

100. If the State were to prevail in whole or in part on its claims, whether an award of fees or costs should be limited so as to preclude recovery on work that was rejected on a legal or factual basis?

101. Whether Defendants are entitled to recover their attorney's fees and costs pursuant to 12 Okla. Stat. § 940 based on the dismissal of the State's claims for damages under Oklahoma common law?

102. Whether the State can assert joint and several liability or other theories of joint action in this equitable case?

103. Whether Oklahoma or Arkansas law provides authorization for the challenged activity under a right-to-farm or other statute?

104. When the Defendants refer to the "waters of the State" in this proposed order, they refer to the waters that the State contends have been injured and for which they have standing to seek a remedy. One question of law for resolution in this matter is what resources the State claims are injured, and whether the State has standing to assert a claim for those resources.

VIII. The following issues of fact, and no others, remain to be litigated upon the trial:

A. The State's issues of fact

1. Whether each Defendant owns or has owned birds in the Illinois River Watershed.

2. Whether each Defendant owns or has owned birds in the Oklahoma portion of the Illinois River Watershed.

3. Whether each Defendant owns or has owned birds in the Arkansas portion of the Illinois River Watershed.

4. Whether each Defendant's birds are being and / or have been raised at Defendant's own poultry feeding operations in the Illinois River Watershed.

5. Whether each Defendant's birds are being and / or have been raised at Defendant's own poultry feeding operations in the Oklahoma portion of the Illinois River Watershed.

6. Whether each Defendant's birds are being and / or have been raised at Defendant's own poultry feeding operations in the Arkansas portion of the Illinois River Watershed.

7. Whether each Defendant's birds are being and / or have been raised at contract poultry feeding operations in the Illinois River Watershed.

8. Whether each Defendant's birds are being and / or have been raised at contract poultry feeding operations in the Oklahoma portion of the Illinois River Watershed.

9. Whether each Defendant's birds are being and / or have been raised at contract poultry feeding operations in the Arkansas portion of the Illinois River Watershed.

10. Whether poultry waste generated by each Defendant's birds has been land-applied in the Illinois River Watershed.

11. Whether poultry waste generated by each Defendant's birds has been land-applied in the Oklahoma portion of the Illinois River Watershed.

12. Whether poultry waste generated by each Defendant's birds has been land-applied in the Arkansas portion of the Illinois River Watershed.

13. Whether poultry waste generated by each Defendant's birds is or has been improperly stored or handled in the Illinois River Watershed.

14. Whether poultry waste generated by each Defendant's birds is or has been improperly stored or handled in the Oklahoma portion of the Illinois River Watershed.

15. Whether poultry waste generated by each Defendant's birds has been improperly stored or handled in the Arkansas portion of the Illinois River Watershed.

16. Whether poultry waste generated by each Defendant's birds raised that has been land-applied in the Illinois River Watershed is running off, has run-off, is leaching or has leached into the waters of the Illinois River Watershed.

17. Whether poultry waste generated by each Defendant's birds that has been land-applied in the Oklahoma portion of the Illinois River Watershed is running off, has run-off, is leaching or has leached into the waters of the Illinois River Watershed

18. Whether poultry waste generated by each Defendant's birds that has been land-applied in the Arkansas portion of the Illinois River Watershed is running off, has run-off, is leaching or has leached into the waters of the Illinois River Watershed.

19. Whether poultry waste generated by each Defendant's birds that is or has been improperly stored or handled in the Illinois River Watershed is running off, has run-off, is leaching or has leached into the waters of the Illinois River Watershed.

20. Whether poultry waste generated by each Defendant's birds that is or has been improperly stored or handled in the Oklahoma portion of the Illinois River Watershed is running off, has run-off, is leaching or has leached into the waters of the Illinois River Watershed.

21. Whether poultry waste generated by each Defendant's birds that has been improperly stored or handled in the Arkansas portion of the Illinois River Watershed is running off, has run-off, is leaching or has leached into the waters of the Illinois River Watershed.

22. Whether poultry waste contains phosphorus in the form of phosphorus compounds.

23. Whether poultry waste contains bacteria, including pathogenic bacteria.

24. Whether each Defendant is a "person" under RCRA.

25. Whether poultry waste generated by each Defendant's birds that is or has been land-applied in the Illinois River Watershed constitutes a "solid waste" under RCRA.

26. Whether poultry waste generated by each Defendant's birds that is not reused or recycled in a continuous process for the purpose of its poultry feeding operations in the Illinois River Watershed constitutes a "solid waste" under RCRA.

27. Whether land-applied poultry waste generated by each Defendant's birds which has been applied above the phosphorus agronomic critical level in the Illinois River Watershed constitutes a discarded material resulting from agricultural operations so as to bring such poultry waste within the definition of "solid waste" under RCRA.

28. Whether land-applied poultry waste generated by each Defendant's birds which runs off or leaches into the waters of the Illinois River Watershed constitutes a discarded material resulting from agricultural operations so as to bring such poultry waste within the definition of "solid waste" under RCRA.

29. Whether each Defendant has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of poultry waste, a solid waste under RCRA, in the Illinois River Watershed which may present an imminent and substantial endangerment to health or the environment.

30. Whether the State is entitled to injunctive / equitable relief against each Defendant under its RCRA claim, and if so, what injunctive / equitable measures against each Defendant are necessary to prevent and remediate the endangerment to health and / or the environment, as well as to assess and monitor remedial alternatives.

31. Whether each Defendant knew or had reason to know that the poultry feeding operations work it had employed its contract growers to do was likely to involve a trespass upon the waters running in definite streams in Oklahoma or the creation of a public nuisance in Oklahoma.

32. To what extent each Defendant controls the actions and activities of its contract growers.

33. Whether the contract growers of each Defendant are the employees and / or agents of each such Defendant.

34. Whether each Defendant, directly or vicariously, has contributed and continues to contribute to phosphorus or bacteria loading in the Illinois River Watershed and whether phosphorus or bacteria in the Illinois River Watershed results in the injury or threatened injury to the waters (and biota therein) of the Oklahoma portion of the Illinois River Watershed.

35. Whether the injury to the waters (and biota therein) of the Oklahoma portion of the Illinois River Watershed is indivisible.

36. Whether each Defendant's relevant nuisance-causing or trespass-causing conduct was done with knowledge that injury was and is resulting or was and is substantially certain to result from its conduct.

37. Whether each Defendant, directly or by vicariously, has engaged in conduct in the Illinois River Watershed so as to have caused (i) a public nuisance, (ii) a trespass, (iii) a nuisance per se, (iv) violations of 27A Okla. Stat. § 2-6-105, or (v) violations of 2 Okla. Stat. § 2-18.1.

38. Whether each Defendant, by its conduct (directly or by the conduct of others) in raising poultry or in handling, storing or land applying poultry waste in the Oklahoma portion of the Illinois River Watershed is causing or has caused or has a reasonable probability of causing (i) an unreasonable interference with or impairment of the State's and the public's beneficial use and enjoyment of the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed, or (ii) an unreasonable and substantial danger to the public's health and safety in the waters located in the Oklahoma portion of the Illinois River Watershed.

39. Whether each Defendant, by its conduct (directly or by the conduct of others) in raising poultry or in handling, storing or land applying poultry waste in the Arkansas portion of the Illinois River Watershed (i) is causing or has caused an unreasonable interference with or impairment of the State's and the public's beneficial use and enjoyment of the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed, or an unreasonable and substantial danger to the public's health and safety in the waters located in the Oklahoma portion of the Illinois River Watershed, or (ii) is causing or has caused a significant threat of an unreasonable interference with or impairment of the State's and the public's beneficial use and enjoyment of the waters (and biota therein) located in the Oklahoma portion of the Illinois River Watershed, or an unreasonable and substantial danger to the public's health and safety in the waters located in the Oklahoma portion of the Illinois River Watershed.

40. Whether each Defendant, by its conduct (directly or by the conduct of others) in raising poultry or in handling, storing or land applying poultry waste in the Illinois River Watershed, is causing or has caused phosphorus or bacteria to enter the waters of the Illinois River Watershed, and by reason thereof causing, without authority or consent, a physical invasion and interference of the State's possessory property interests in the waters running in definite streams located in the Oklahoma portion of the Illinois River Watershed.

41. Whether each Defendant, by its conduct (directly or by the conduct of others) in raising poultry or in handling, storing or land applying poultry waste in the Oklahoma portion of the Illinois River Watershed, in violating 27A Okla. Stat. § 2-6-105, is causing or has caused a nuisance *per se*.

42. Whether each Defendant, by its conduct (directly or by the conduct of others) in raising poultry or in handling, storing or land applying poultry waste in the Oklahoma portion of the Illinois River Watershed, in violating 2 Okla. Stat. § 2-18.1, is causing or has caused a nuisance *per se*.

43. Whether each Defendant, by its conduct (directly or by the conduct of others) in raising poultry or in handling, storing or land applying poultry waste in the Oklahoma portion of the Illinois River Watershed, is placing or has placed poultry waste, or is causing or has caused poultry waste to be placed, in a location where it causes pollution of, or is likely to cause pollution of, any waters of the State in the Illinois River Watershed in violation of 27A Okla. Stat. § 2-6-105.

44. Whether each Defendant, by its conduct (directly or by the conduct of others) in raising poultry or in handling, storing or land applying poultry waste in the Oklahoma portion of the Illinois River Watershed, is causing or has caused pollution of any waters in the Oklahoma portion of the Illinois River Watershed in violation of 27A Okla. Stat. § 2-6-105.

45. Whether each Defendant is subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry.

46. Whether each Defendant, by its conduct (directly or by the conduct of others) in feeding poultry or in handling, storing or land applying poultry waste in the Oklahoma portion of the Illinois River Watershed is causing or has caused pollution of any waters in the Oklahoma portion of the Illinois River Watershed in violation of 2 Okla. Stat. § 2-18.1.

48. Whether the State is entitled to injunctive / equitable relief against any Defendants under its nuisance and trespass claims, and if so, what injunctive / equitable measures against each Defendant are necessary to prevent and remediate the nuisance and / or trespass, as well as to assess and monitor remedial alternatives.

49. Whether injunctive / equitable relief against each Defendant for its violations of 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1 should be imposed, and if so, the nature of such injunctive / equitable relief against each Defendant necessary to prevent and remediate the nuisance, as well as to assess and monitor remedial alternatives.

50. Whether penalties should be imposed against each Defendant for its violations of 27A Okla. Stat. § 2-6-105, and if so, the amount of such penalties.

51. Whether costs and expenses, including but not limited to expert witness costs and reasonable attorney fees, should be imposed upon Defendants pursuant to RCRA or the Oklahoma Environmental Quality Code, and if so, in what amount.

52. Whether the acts, conduct and omissions of Benton County Foods, L.L.C. in connection with its poultry feeding operations in the Illinois River Watershed are legally those of Cal-Maine Foods, Inc.

53. Whether the State has brought this action on its own behalf and as *parens patriae* on behalf of the citizens of Oklahoma.

54. Whether approximately 70 miles of the Illinois River, approximately 35 miles of Baron Fork Creek and approximately 12 miles of Flint Creek have been designated since 1970 by the Oklahoma Legislature as Scenic River Areas.

55. Whether the designation as "Scenic River Areas" reflects a recognition by the Oklahoma Legislature that these rivers and streams "possess such unique natural scenic beauty, water conservation, fish, wildlife and outdoor recreational values of present and future benefit to the people of the state that it is the policy of the Legislature to preserve these areas for the benefit of the people of Oklahoma."

56. Whether the State has designated the Illinois River, Flint Creek and Baron Fork Creek, as well as many of their tributaries as "Outstanding Resource Waters" because of their exceptional recreational and ecological significance and these waters are, accordingly, given the highest level of protection from pollution under the law.

57. Whether any degradation of water quality in outstanding resource waters and scenic rivers, including waters located within the watersheds of scenic rivers, is expressly prohibited by Oklahoma law.

58. Whether the State has designated Lake Tenkiller as a "High Quality Water" in which the historically high water quality must be maintained and protected.

59. Whether pollution of the Illinois River Watershed by phosphorus and bacteria has caused waters located within the watershed to be in violation of anti-degradation standards and narrative and numeric water quality criteria set forth in the law to protect and maintain beneficial uses of the water.

60. Whether each Defendant, individually and / or by and through its duly authorized agents, servants, employees and / or contractors, is operating and / or has operated poultry feeding operations in the Illinois River Watershed.

61. Whether each Defendant's poultry feeding operations in the Illinois River Watershed are integrated.

62. Whether Defendants control all aspects of the poultry feeding operations in the Illinois River Watershed and are, thus, directly and vicariously liable for the poultry waste disposal activities and resulting pollution of the waters in the Illinois River Watershed.

63. Whether the poultry waste generated by Defendants' birds contains, without limitation, phosphorus in the form of phosphorus compounds (hereinafter "phosphorus") and pathogenic bacteria.

64. Whether waters of the Illinois River Watershed flowing in definite streams and located in Oklahoma, including the Illinois River, Baron Fork Creek, Caney Creek, Flint Creek and Tenkiller Ferry Lake are, and have long been, used for recreation.

65. Whether waters of the Illinois River Watershed located in Oklahoma are, and have long been, used for drinking water and public supply.

66. Whether the acts, conduct and omissions of George's Farms, Inc. (a wholly owned subsidiary of George's, Inc.) in connection with its poultry feeding operations in the Illinois River Watershed are legally those of George's, Inc.

67. Whether the acts, conduct and omissions of Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. (each wholly owned subsidiaries of Tyson Foods, Inc.) in connection with each's poultry feeding operations in the Illinois River Watershed are legally those of Tyson Foods, Inc.

68. Whether the nutrients and other components in poultry waste originate in the IRW and thus are "returned" to the soil of the IRW when they are land applied in the IRW.

69. Whether poultry waste is fertilizer or a soil amendment.

70. Whether the land application of poultry waste under each Defendants waste disposal practices predate use of water of the Oklahoma portion of the IRW for recreation and drinking water supply and other beneficial uses.

71. Whether the land application of poultry waste under each Defendants' waste disposal practices constitutes good agricultural practices.

72. Whether each Defendant's waste disposal practices is having or has had a substantial adverse effect on the public health and safety.

73. Whether the Oklahoma Registered Poultry Feeding Operations Act has any applicability to conduct before its effective date?

74. Whether the Arkansas statutes (1) Ark. Code Ann. §§ 15-20-901 et seq., "Arkansas Poultry Feeding Operations Registration Act," (2) Ark. Code Ann. §§ 15-20-1001 et seq., "Arkansas Soil Nutrient Management Planner and Applicator Certification Act," and (3) Ark. Code Ann. §§ 15-20-1101 et seq., "Arkansas Soil Nutrient Application and Poultry Litter

Utilization Act.” and regulations thereunder have any applicability to this case?

75. Whether the Arkansas statutes (1) Ark. Code Ann. §§ 15-20-901 et seq., “Arkansas Poultry Feeding Operations Registration Act,” (2) Ark. Code Ann. §§ 15-20-1001 et seq., “Arkansas Soil Nutrient Management Planner and Applicator Certification Act,” and (3) Ark. Code Ann. §§ 15-20-1101 et seq., “Arkansas Soil Nutrient Application and Poultry Litter Utilization Act.” and regulations thereunder have any applicability prior to their effective date?

76. Whether each Defendant owns the poultry waste created by its birds?

77. Whether each Defendant’s conduct, directly or vicariously, is authorized expressly or otherwise by statute?

78. Whether Defendants’ conduct, directly or vicariously, contributes to exceedences of Oklahoma water quality standards in the Oklahoma portion of the IRW?

79. Whether an animal waste management plan is a permit or authorization to land apply poultry waste.

80. Whether the State permits or authorizes land application of poultry waste.

81. Whether an animal waste management plan permits or authorizes any particular instance of land application of poultry waste in the Illinois River Watershed.

82. Whether poultry waste must be managed and applied in accordance with all provisions of the Oklahoma Registered Poultry Feeding Operations Act, as well as and including all provisions of state and federal law.

83. Whether Arkansas regulation of poultry waste can authorize violations of Oklahoma or federal law.

84. Whether Arkansas regulation of poultry waste can authorize conduct creating or threatening to create pollution, contamination or endangerments to human health or the environment in Oklahoma.

85. The issues of mixed fact and law set forth in section VII.A above.

86. Whether the Oklahoma Registered Poultry Feeding Operations Act or any requirement or provision therein acts as an affirmative defense to each Defendant's liability for pollution or threatened pollution from poultry waste generated by its birds.

87. Whether each Defendant has proven that poultry waste has been managed and applied in a manner consistent with an animal waste management plan and the Oklahoma Registered Poultry Feeding Operations Act.

The State reserves all issues of fact raised in its Second Amended Complaint that have been removed from the trial of this matter by virtue of one or more rulings by this Court (e.g., on motions to dismiss, on motions for summary judgment, on motions for judgment on the pleadings, on the Rule 19 motion, etc.) so as to ensure the preservation of such issues for purposes of appeal or any subsequent trial or retrial of claims (including claims for relief raised in the Second Amended Complaint.

B. Defendants' issues of fact

1. Whether poultry litter is applied to land in the IRW by registered poultry farmers or certified applicators consistent with a nutrient management plan (“NMP”) and/or animal waste management plan (“AWMP”) (sometimes herein referenced as “litter management plans”)?

2. Whether the litter management plans are drafted, issued and approved by agents authorized to act on behalf of the State of Oklahoma and the State of Arkansas.

3. Whether, before and during this litigation, agents for the States of Oklahoma and Arkansas have continued to draft, approve and issue new litter management plans for land application of poultry litter within the IRW?

4. Whether the litter management plans are specifically tailored to each field, take into consideration the unique characteristics of that property, and dictate the method, location, time and amount of poultry litter that may be applied?

5. Whether the litter management plans are designed by agents on behalf of Oklahoma and Arkansas to prevent pollution and runoff to the waters of the State?

6. Whether Defendants and/or the Contract Growers who raise poultry for Defendants reasonably believe that compliance with the litter management plans will avoid pollution or runoff to the waters of the State?

7. Whether Defendants and/or the Contract Growers who raise poultry for Defendants reasonably believe that compliance with the litter management plans is sufficient to comply with state and federal law?

8. Whether The State can prove that any particular application of poultry litter in the IRW has been performed in the absence of or in violation of a litter management plan?

- a. Whether the State can prove that any particular application of poultry litter *by a Defendant* was performed in the absence of or in violation of a litter management plan for that field?
- b. Whether the State can prove that any particular application of poultry litter *by a Contract Grower* was performed in the absence of or in violation of a litter management plan for that field?

- c. Whether the State can prove that any particular application of poultry litter *by a non-party farmer or rancher (who is not a Grower)* was performed in the absence of or in violation of a litter management plan for that field?

9. Whether the state-approved poultry litter management plans provide that farmers may apply poultry litter to one or more specific fields in the IRW in amounts not necessarily limited to the agronomic rate for the phosphorus contained within that litter, however agronomic rate is defined?

10. Whether poultry litter provides various types of nutrients essential to plant growth, increases crop yields, improves soil structure, tilth, organic content, and pH balance, or has other benefits to the soil?

11. Whether some or all soils in the IRW derive agronomic benefit from the nutrients and conditioning properties of poultry litter, including poultry litter's acid neutralizing effects?

12. Whether the land application of poultry litter provides at least an incidental benefit to the soil?

13. Whether poultry litter outperforms commercial fertilizers in some aspects?

14. Whether commercial fertilizers contain water soluble phosphorous that is susceptible to runoff?

15. Whether poultry litter is less expensive than commercial fertilizers?

16. Whether some or many fields within the IRW need phosphorous compounds to be added to the soil for improved crop production?

17. Whether there is a market for poultry litter in the IRW?

18. Whether poultry litter has monetary value in the IRW?

19. Whether poultry litter is bought, sold, and traded in the IRW?

20. Whether Oklahoma encourages and participates in the market for poultry litter in the IRW?

21. Whether any specific Defendant has applied poultry litter to land in the IRW?

22. Whether any specific Defendant has applied poultry litter to land in the Oklahoma-portion of the IRW?

23. Whether each Defendant contracts with non-party Contract Growers that have applied poultry litter to land in the IRW?

24. Whether each Defendant contracts with non-party Contract Growers that have applied poultry litter to land in the Oklahoma-portion of the IRW?

25. Whether non-party farmers and ranchers who are not Contract Growers and do not contract with or have any relationship with Defendants have applied poultry litter obtained on the open-market to land in the IRW?

26. Whether non-party farmers and ranchers who are not Contract Growers and do not have any relationship with Defendants have applied poultry litter obtained on the market to land in the Oklahoma-portion of the IRW?

27. When growers, non-party farmers, and others in the IRW have land-applied poultry litter, was it their intent to throw away or abandon the poultry litter or to put it to a beneficial use?

28. Whether Oklahoma and its agents recognize poultry litter as an effective fertilizer, and actively encourage or approve of its use in the IRW?

29. Whether Arkansas recognizes litter as an effective fertilizer, and encourages or approves its use in the IRW?

30. Whether non-party farmers and ranchers who contract with Defendants use poultry litter in the IRW as a fertilizer and soil conditioner?

31. Whether poultry litter used as fertilizer in the IRW is land-applied by non-party farmers and ranchers who are not poultry Contract Growers, but who purchase or obtain the litter from Growers or other sources (not Defendants) and maintain no relationship with Defendants?

32. Whether non-party farmers and ranchers in the IRW use poultry litter as a substitute for commercial fertilizers?

33. Whether Defendants dictate when Growers must clean out poultry litter from their poultry houses or barns or whether Growers typically determine when to do so?

34. Whether Growers decide when to clean out poultry litter from their poultry houses or barns?

35. Whether access to and use of poultry litter is an inducement for farmers and ranchers to raise poultry?

36. Whether Growers' contracts with Defendants infringe on the Growers' ownership and use of the litter beyond simply requiring Growers to comply with all federal, state and local laws and regulations related to the sale, distribution, storage, management or use of poultry litter?

37. Whether Growers sell, distribute, store, or use their poultry litter at their own discretion, subject to state and federal law?

38. If a Grower decides to apply poultry litter as a fertilizer to the Grower's own farm or pasture land, whether the Grower or one of the Defendants determines the time, method, location, and amount of poultry litter to be applied?

39. If a Grower decides to sell, trade, or otherwise transfer title to poultry litter that is removed from the Grower's poultry houses or barns, whether the Grower or one of the Defendants determines the buyer, timing, quantity, and price for the transaction?

40. If a Grower sells, trades, or otherwise transfers title to poultry litter, whether the Grower or one of the Defendants receives and retains the proceeds from the sale or distribution?

41. Whether any Defendant participates in, or controls, any Contract Grower's management, sale, transfer, storage, or use of poultry litter?

42. Whether any Defendant participates in, or controls, the management, sale, distribution, storage, or use of poultry litter by non-party farmers and ranchers who obtain poultry litter from Growers or other sources (not Defendants)?

43. Whether different bacteria have different "fate and transport" characteristics, which govern their ability to move and survive in the environment, which include numerous factors such as the particular bacterium's surface charge, shape, size, and mode of movement, and environmental stresses including sunlight, oxygen, temperature, humidity, pH, salinity, desiccation, topography, vegetation, and predation?

44. Whether the conditions under which poultry litter is spread on the ground in the IRW kills bacteria, while the bacteria from some other sources are sheltered and therefore persist and multiply?

45. Whether human pathogenic bacteria have been identified in the poultry litter identified with each Defendant or each Defendants' Growers in the IRW.

46. Whether human pathogenic bacteria have been identified in waters of the State in the IRW?

47. Whether the presence of human pathogenic bacteria can be proven solely by the presence of fecal indicator bacteria?

48. Whether the water quality in the IRW has improved in recent years despite growth in poultry populations?

49. Whether the State can demonstrate that any bacteria or phosphorus found in the waters of the State derive from poultry litter as opposed to myriad other sources?

50. Whether numerous sources contribute bacteria and phosphorous to the IRW including but not limited to waste water treatment facilities, cattle, swine, and other domesticated animals, wildlife, dogs, cats, and other household pets, humans, erosion, urbanization, and urban runoff?

51. Whether many sources of phosphorous to the IRW contribute bacteria and phosphorous compounds directly into or proximate to the waters of the IRW?

52. Whether the form of phosphorous differs from source to source and whether different forms of phosphorous are more or less bioavailable to support plant-growth?

53. Whether the cessation of the use of poultry litter in the IRW will reduce the contribution of bacteria or phosphorous to the IRW from any other source?

54. Whether the claimed injuries to the waters of the State has, in fact, occurred and whether the State can prove that each Defendant was the cause?

55. Whether phosphorus compounds and bacteria are some of the most common substances found in nature?

56. Whether the IRW encompasses thousands of separately-owned parcels of real property dedicated to a wide array of retail, transportation, industrial, residential, agricultural, educational, public, religious, cultural and recreational uses?

a. Whether each of these uses contributes bacteria and phosphorus to the waters of the State?

57. Whether the vast majority of the acreage in the IRW has never had poultry litter deposited, stored, disposed of, placed, or located on that property?

58. Whether bacteria and phosphorus levels in IRW waters are substantially similar to bacteria and phosphorus levels in waters statewide, including locations that have little or no poultry farming?

59. Whether rates of bacterial illness in the IRW are substantially similar to rates statewide?

60. Whether the State can prove that any illness was caused by exposure to poultry litter or constituents of poultry litter in the IRW?

61. Whether any basis exists to believe that poultry litter or its constituents has contributed or could contribute to any outbreak of illness in the IRW?

62. Other than in the instances where multiple Defendants are in the same corporate family, whether Defendants compete with each other for raw materials, labor in the form of company employees and opportunities to contract with independent Contract Growers, customers, capital, and other business opportunities?

63. Other than in the instances where multiple Defendants are in the same corporate family, whether the operations and assets of the numerous Defendants in this case are separately run and owned?

64. Whether the identity and number of Contract Growers that choose to associate with any particular Defendant varies over time?

65. Whether Contract Growers in this case have switched the companies with whom they contract?

66. Whether Contract Growers operate different farms that are in different, unique locations in the IRW?

67. Whether each of these farm locations has different characteristics including differing size, topography, and distance from streams or other water bodies?

68. Whether a substantial portion of the Contract Growers' farms are diversified agricultural operations in which the Growers use their poultry litter to enhance the productivity and profitability of their operations?

69. Whether the State of Oklahoma has itself discharged phosphorus compounds and bacteria into the waters of the State in the IRW?

70. Whether the State of Oklahoma has issued permits allowing for the discharge of phosphorus compounds and bacteria into the waters of the State in the IRW?

71. Whether the State of Oklahoma has itself land applied in the IRW human sewage biosolids and wastewater containing phosphorus compounds and bacteria?

72. Whether the State of Oklahoma has issued permits and promulgated regulations allowing for the land application in the IRW of human sewage biosolids and wastewater containing phosphorus compounds and bacteria?

73. Whether the State of Oklahoma has failed to effectively address violations of its laws and regulations with regard to human waste handling and treatment systems with the IRW that has resulted in the release of phosphorus and bacteria?

74. Whether poultry litter used as fertilizer in the IRW is land-applied by non-party farmers and ranchers who are not poultry Growers, but who purchase or obtain the litter from non-party Growers or other sources (not Defendants)?

75. Whether the State of Oklahoma has land applied poultry litter in the IRW and has used poultry litter as a fertilizer within the IRW?

76. Whether the State of Oklahoma has land applied commercial fertilizers in the IRW?

77. Whether the State of Oklahoma contributes to erosion in the IRW?

78. Whether the State of Oklahoma maintains adequate restroom facilities for recreators in the IRW, or whether such individuals contribute human sewage including phosphorous and bacteria to the IRW?

79. Whether bacteria and/or phosphorus from poultry litter applied to any specific field in the IRW has been transported to the waters of the State in the Illinois River and its tributaries, or Lake Tenkiller?

80. Whether any injunction Oklahoma seeks would impose harms on Defendants and non-parties and, if so, to what extent?

81. The issues of fact set forth in sections VIII (A) above.

82. The issues of mixed fact and law set forth in sections VII (A) and (B) above.

83. Whether poultry litter is applied to land in the IRW by registered poultry farmers (“Grower”) or certified applicators consistent with a nutrient management plan (“NMP”) and/or animal waste management plan (“AWMP”) (herein referenced as “litter management plans”)?

84. Whether the litter management plans are drafted, issued and approved by agents authorized to act on behalf of the State of Oklahoma and the State of Arkansas.

85. Whether, before and during this litigation, agents for the States of Oklahoma and Arkansas have continued to draft, approve and issue new litter management plans for land application of poultry litter within the IRW?

86. Whether the litter management plans are specifically tailored to each field, take into consideration the unique characteristics of that property, and dictate the method, location, time and amount of poultry litter that may be applied?

87. Whether the litter management plans are designed by agents on behalf of Oklahoma and Arkansas to prevent pollution and runoff to the waters of the State?

88. Whether Defendants and/or the Contract Growers who raise poultry for Defendants believe that compliance with the litter management plans will avoid pollution or runoff to the waters of the State?

89. Whether Defendants and/or the Contract Growers who raise poultry for Defendants believe that compliance with the litter management plans is sufficient to comply with state and federal law?

90. Whether The State can prove that any particular application of poultry litter in the IRW has been performed in the absence of or in violation of a litter management plan?

- a. Whether the State can prove that any particular application of poultry litter *by a Defendant* was performed in the absence of or in violation of a litter management plan for that field?

- b. Whether the State can prove that any particular application of poultry litter *by a Contract Grower* was performed in the absence of or in violation of a litter management plan for that field?
- c. Whether the State can prove that any particular application of poultry litter *by a non-party farmer or rancher (who is not a Grower)* was performed in the absence of or in violation of a litter management plan for that field?

91. Defendants reserve all issues of fact that have been removed from the trial of this matter by virtue of one or more rulings by this Court so as to ensure the preservation of such issues for purposes of appeal or further proceedings in this case.

IX. The exhibits to be offered at trial together with a statement of all admissions by and all issues between the parties with respect thereto are as follows:

A. The State's exhibits:

See exhibit list attached as Exhibit "A".

The State may use any document, even if not designated as an exhibit, for the purposes of rebuttal, cross-examination and/or impeachment. While the Court has stated that exhibits not on the exhibit list are not generally admissible, the Court will rule on admissibility on an individual basis.

B. Defendants' exhibits:

See exhibit list attached as Exhibit "B".

A Cargill-specific exhibit list is attached as Exhibit "C".

If the State is permitted to utilize documents pursuant to the reservations stated above despite Defendants' objections, Defendants reserve the right to also make such use of documents.

Defendants may use any document, even if not designated as an exhibit, for the purposes of rebuttal, cross-examination and/or impeachment. While the Court has stated that exhibits not on the exhibit list are not generally admissible, the Court will rule on admissibility on an individual basis.

X. The following primary witnesses will be called:

A. The State's primary witnesses:

See primary witness list attached as Exhibit "E".

B. Defendants' primary witnesses:

See primary witness list attached as Exhibit "D".

XI. The following secondary witnesses may be called:

A. The State's secondary witnesses:

See secondary witness list attached as Exhibit "G".

B. Defendants' secondary witnesses:

See secondary witness list attached as Exhibit "F".

XII. The possibility of settlement of this case has been explored with the following results:

The State and Defendants have participated in both court-supervised and private settlement discussions. There are still significant differences between the parties on issues pertaining to non-monetary and monetary relief. At this time, settlement seems unlikely.

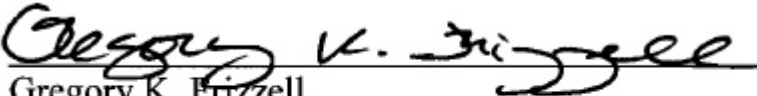
XIII. The foregoing admissions having been made by the parties and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supersede the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

None.

XIV. The State anticipates the estimated total trial time to be 40 days. The State requests that the 40 days of trial time be split evenly between the parties.

Defendants propose 20 days of trial time for the State and 30 days of trial time for Defendants. The State objects to this.

Dated this 24th day of September 2009.


Gregory K. Frizzell
United States District Judge
Northern District of Oklahoma